



POLICE DEPARTMENT

The  
City  
of  
New York

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In the Matter of the Disciplinary Proceedings :  
  
- against : FINAL  
  
Sergeant Hector Mercado : ORDER  
  
Tax Registry No. 919410 : OF  
  
Military and Extended Leave Desk : DISMISSAL  
-----x-----

Sergeant Hector Mercado, Tax Registry No. 919410, Social Security No. ending in [REDACTED], having been served with written notice, has been tried on written Charges and Specifications numbered 2017-17542, as set forth on form P.D. 468-121, dated June 15, 2017, and after a review of the entire record, Respondent is found Guilty.

Now therefore, pursuant to the powers vested in me by Section 14-115 of the Administrative Code of the City of New York, I hereby DISMISS Sergeant Hector Mercado from the Police Service of the City of New York.

A handwritten signature in blue ink that reads "James P. O'Neill".

JAMES P. O'NEILL  
POLICE COMMISSIONER

EFFECTIVE: 2/6/19



POLICE DEPARTMENT

January 10, 2019

In the Matter of the Charges and Specifications	:	Case No.
- against -	:	2017-17542
Sergeant Hector Mercado	:	
Tax Registry No. 919410	:	
Military and Extended Leave Desk	:	
-----X-----		
At:	Police Headquarters One Police Plaza New York, New York 10038	
Before:	Honorable Jeff S. Adler Assistant Deputy Commissioner Trials	

APPEARANCES:

For the Department:	David Green, Esq. Department Advocate's Office One Police Plaza New York, NY 10038
For the Respondent:	Matthew Schieffer, Esq. The Quinn Law Firm Crosswest Office Center 399 Knollwood Road – Suite 220 White Plains, NY 10603

To:

HONORABLE JAMES P. O'NEILL  
POLICE COMMISSIONER  
ONE POLICE PLAZA  
NEW YORK, NEW YORK 10038

## CHARGES AND SPECIFICATIONS

1. Said Sergeant Hector Mercado, while assigned to Transit Division District 2, on or about and between September 4, 2016 and December 4, 2016, while off-duty, in or about [REDACTED] in [REDACTED] intentionally touched a female individual known to the Department, to wit: Person A, for no legitimate purpose, thereby degrading or abusing said individual.

P.G. 203-10, Page 1, Paragraph 5      PUBLIC CONTACT - PROHIBITED CONDUCT  
GENERAL REGULATIONS

N.Y.S. Penal Law Section 130.52      "Forcible touching"

## REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on December 5, 2018. Respondent, through his counsel, entered a plea of Not Guilty to the subject charge. The Department called Angel Mendoza, an investigator from the [REDACTED] Sheriff's Office, and Sergeant Odo Penniston of IAB's Special Investigations Unit, as witnesses, and introduced hearsay statements of the complainant and Person B. Respondent testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review. Having reviewed all of the evidence in this matter, I find Respondent guilty, and recommend that he be dismissed from the Department.

## ANALYSIS

This case involves an accusation that Respondent wrongfully touched [REDACTED]

[REDACTED], hereinafter referred to as "Person A", during the time period between September 4, 2016 and December 4, 2016. Specifically, it is alleged that on more than one occasion, Respondent touched Person A's vagina and butt over her clothing, as well as her breasts, while inside [REDACTED] in [REDACTED] The alleged misconduct came to light in June of 2017 when Person A told a friend about it, who encouraged Person A to inform [REDACTED] Person B. Person A did so, and the

two of them subsequently walked into the [REDACTED] Sheriff's Office to report what had occurred.

Person A and Person B did not appear to testify at this hearing. However, this tribunal did have the benefit of hearing from two law enforcement witnesses who testified regarding what Person A and Person B had told them, and each of these witnesses was subjected to cross-examination. Additionally, a handwritten letter in which Person A described Respondent's actions was admitted into evidence.

Investigator Angel Mendoza, assigned to the Child Abuse Unit at the [REDACTED] Sheriff's Office, testified that he separately interviewed Person A and Person B when they came to the office on June 12, 2017. Person A appeared upset and nervous as she described Respondent's conduct. According to Mendoza, he went over the statement with Person A a few times, and Person A remained consistent in her narrative. Mendoza prepared a typed statement memorializing Person A's account (Dept. Ex. 2), which Person A reviewed and repeatedly signed under penalty of perjury. (Tr. 29-32, 42-43, 49-50)

In the statement,<sup>1</sup> Person A described how while she was in middle school, Respondent, who [REDACTED] referred to as [REDACTED] started touching her on her vagina, butt, and breasts. This occurred while they were watching movies on the couch in the basement. Respondent would start by rubbing Person A's feet, then "work his hand up my leg under my pajama or sweat pants and touch my butt and vagina over my underwear." Person A stated that Respondent touched her in the same way in the fall of 2016, and the conduct got even more frequent: Respondent touched her in

<sup>1</sup>This statement, and others made by Person A, include references to earlier similar conduct by Respondent. In recounting Respondent's behavior during the fall of 2016, Person A stated that Respondent touched her in the "same way" that he had when she was in middle school, which Person A described in great detail. Since those alleged earlier incidents occurred prior to the time period specified in the charge before this tribunal, they were not held against Respondent as prior bad acts. Rather, the statements were only considered to clarify how Respondent allegedly touched her during the short time frame of the specification.

this way once every couple of weeks during the fall of 2016. She specified one instant where he started rubbing her feet then moved his hand up her thighs and “poked” her vagina, causing her to jump up. (Dept. Ex. 2) (Tr. 52-59)

Mendoza testified that when he spoke with Person B, she appeared distraught. She explained to him how a friend had called her to say that Person A had something to tell her. Person B went to the friend’s home, where Person A handed her a letter handwritten by Person A summarizing some of the inappropriate touching to which she was subjected by Respondent. In that letter (Dept. Ex. 1), Person A described how when she was in middle school, Respondent, while they were watching movies, “would be rubbing my feet and move his hands up my leg and at first he would just poke my vagina and stop because I would get mad. Then he would start again with his hands moving up my leg and would move his fingers along my vagina through my underwear.” According to Person A, this touching got worse during high school, when she was ■■■■■ with Respondent more frequently. (Dept. Ex. 1) (Tr. 33-35, 63)

Mendoza testified that during his investigation, he asked whether there were any ■■■■■ problems, and learned that there was no animosity or grudge between Person A and Respondent. There was no suggestion that Person A had a propensity to lie; even Respondent described her as “a good kid.” (Tr. 45, 65)

According to Mendoza, he arranged controlled phone calls from Person A and Person B to Respondent, but Respondent made no admissions. ■■■■■  
■■■■■  
■■■■■

Sergeant Odo Penniston of IAB testified that he conducted separate telephone interviews with Person A and Person B on October 16, 2017. A recording of those interviews (Dept. Ex. 3), and the

accompanying transcripts (Dept. Ex. 3A and 3B, respectively), were introduced into evidence. According to Penniston, there were no discrepancies in Person A's account of what transpired. His investigation did not reveal any suggestion that Person A was a liar, or that she had a motive to fabricate an accusation against Respondent. (Tr. 71, 77)

In her recorded statement to Penniston, Person A explained how around middle school Respondent started having an obsession with her feet. She stated, "And then it just progressed from there. He would move up my leg, he'd start touching my leg and then as he started touching like my upper thighs and he'd keep going from there." Person A also stated, "I mean, this type of thing, like he would touch me, like over my underwear, but this happened several times, like over, until I was, basically an adult." She then added, "He also, would also like massage my back and he also would touch my breasts underneath my clothes." (Dept. Ex. 3A at 4-5) (Tr. 80-82, 84-86)

Later in her statement, Person A explained what prompted her to report Respondent's actions. She stated that they were preparing to move [REDACTED], and that she would be [REDACTED] establishing residency in order to qualify for less expensive college tuition. Person A was afraid that since Respondent was retiring, he would be [REDACTED] and the touching would continue. This fear led Person A to tell her friend what had happened, which she did through her handwritten letter. She asked her friend's father for advice, and then Person A told Person B what had happened. Person A and Person B went together to the police to report Respondent's conduct.

(Dept. Ex. 3A at 6-7) (Tr. 74)

In her recorded statement, Person B explained how Person A, who seemed very worried, told her she needed to tell her something. Since what she had to say involved Respondent, they went [REDACTED] to have the conversation. There, Person A passed Person B the handwritten letter, which

described how Respondent had touched her. Person B was shocked to hear what had occurred, and decided to accompany Person A to Child Protective Services to report it. (Dept. Ex. 3B at 3-5)

Respondent testified that he is in the process of [REDACTED] He and Person B [REDACTED]

[REDACTED] Respondent [REDACTED]

[REDACTED] Respondent described Person A as [REDACTED] with whom he had a close relationship. (Tr. 90-91, 97)

Respondent denied that he ever touched Person A inappropriately. He did acknowledge that he massaged Person A's feet, knees, and back while they were watching movies, possibly during the fall of 2016. He claimed, however, that he never touched her vagina, butt, or breasts.

[REDACTED]  
[REDACTED]  
When asked for possible reasons Person A may have had to fabricate these accusations, Respondent mentioned three possibilities. First, he suggested that she may have been upset about the pending [REDACTED], since she had friends in [REDACTED]. However, Respondent conceded that Person A never voiced any objections to him regarding the [REDACTED]. Second, Person A may have been jealous of the attention that [REDACTED] Person C received when [REDACTED]

[REDACTED] Third, Respondent testified regarding a day in April of 2017 where he found a beer bottle [REDACTED], leading him to believe that someone had possibly been [REDACTED] with Person A. [REDACTED] However, Respondent never confronted Person A about this discovery [REDACTED] (Tr. 92-94, 100, 103-07)

Specification 1 charges Respondent with wrongfully touching Person A. Person A and Person B did not appear to testify at this hearing; instead, their hearsay accounts, including a

handwritten letter and statements to two separate law enforcement entities, were admitted into evidence. Hearsay evidence is admissible in an administrative tribunal, and a case may be proven with such evidence provided it is found to be sufficiently reliable and probative on the issues to be determined. See *Ayala v. Ward*, 170 A.D.2d 235 (1<sup>st</sup> Dept. 1991); *In the Matter of 125 Bar Corp v. State Liquor Authority of the State of New York*, 24 N.Y.2d 174 (1969). To be sure, it would have been preferable to have live testimony from Person A and Person B, with opposing counsel given the opportunity to cross-examine the witnesses. Nevertheless, this tribunal did have the benefit of observing live testimony from Mendoza and Penniston, each of whom was subjected to cross examination regarding their respective interactions with Person A and Person B. The court was able to evaluate multiple statements from Person A and Person B, and assess whether they were logical and consistent.

Investigator Mendoza convincingly described how Person A and Person B walked into the [REDACTED] Sheriff's Office to report Respondent's conduct. Person B and Person A were both visibly upset as they provided details of what occurred, details that remained consistent throughout multiple tellings. Person A's handwritten letter, in which she described how Respondent inappropriately touched her, was admitted into evidence. The sworn statement of Person A, in which she described how Respondent wrongfully touched her vagina, butt, and breasts, was memorialized in a typed report signed by Person A under penalty of perjury.

Similarly, Sergeant Penniston described his telephone conversations with Person A and Person B. He testified credibly that he heard no discrepancies in Person A's account, and that his investigation did not reveal any indication that Person A was lying or that she had any motive to fabricate her accusations against Respondent. Additionally, the sergeant's conversations with Person A and Person B were recorded and introduced into evidence, so this tribunal had the benefit of hearing each of

them recount what occurred in their own voices. Person A sounded confident and assured as she described how she was illegitimately touched by Respondent until [REDACTED] She also explained her fear that she would be alone with Respondent during their first year [REDACTED], and how that concern prompted her to report Respondent's actions. Likewise, Person B convincingly described the circumstances of how these events came to light. It is telling that despite her shock at learning about Respondent's behavior, Person B was completely supportive of Person A in reporting Respondent's misconduct to the authorities.

After hearing from each of these law enforcement witnesses, reviewing Person A's handwritten letter and sworn typed statement, and listening to the audio recordings of Penniston's phone interviews of Person A and Person B, I credit Person A's version of events. Even though the evidence presented was hearsay, and the statements lacked detail as to precise times, dates, and locations, the evidence establishing Respondent's guilt was persuasive. Through all its recitations, to Person B and to two separate law enforcement entities, including a specialized IAB supervisor, Person A's overall account remained consistent and logical. Person A convincingly described how Respondent violated her by touching her inappropriately on more than one occasion during the time period in question. Also to her credit, Person A did not embellish her story; rather, she was measured in her statements about Respondent, denying that Respondent made her touch his penis, and acknowledging that there was no sexual intercourse between them. Further, Person A's explanation for the timing of her outcry, how she was fearful of being alone with Respondent during the first year of their imminent [REDACTED] had the ring of truth to it.

Respondent's testimony, meanwhile, was not persuasive. When asked about possible motivations for Person A to fabricate these accusations, none of the proposed explanations offered by Respondent was convincing. He suggested that Person A may have been upset about the pending

[REDACTED] since she had friends in [REDACTED]. However, Respondent conceded that Person A never voiced any objections to him regarding the [REDACTED]. Respondent also testified that Person A was jealous of the attention given to [REDACTED], Person C, [REDACTED]

[REDACTED] However, there was a lack of credible evidence connecting that supposed jealousy to the allegations of wrongful touching, and so any suggestion that Person A concocted her allegations because of jealousy is purely speculative. Finally, Respondent testified regarding a day where he found a beer bottle [REDACTED] leading him to suspect that someone had been [REDACTED] with Person A, [REDACTED]. However, Respondent never confronted Person A about this discovery [REDACTED] so there is no reason to believe that Person A fabricated allegations in retaliation.

Moreover, when confronted with Person A's accusations on the witness stand, Respondent, [REDACTED] corroborated some of her account. He admitted that he did massage certain body parts of Person A, including her feet, knees, and back, which Person A repeatedly described as the prelude for the inappropriate touching which would follow. However, Respondent denied touching Person A's vagina, butt, or breasts. Under the totality of circumstances, that denial did not come across as genuine or sincere.

Taken together, the preponderance of the credible evidence has established that Respondent subjected Person A to inappropriate touching, just as Person A alleged. In the fall of 2016, he repeatedly touched Person A's vagina and butt over her clothing, as well as her breasts, while inside [REDACTED] in [REDACTED] Accordingly, I find Respondent guilty.

## PENALTY

In order to determine an appropriate penalty, Respondent's service record was examined. See Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 240 (1974). Respondent was appointed to

the Department on April 15, 1997. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

Respondent has no disciplinary record.

The Advocate recommends that Respondent be dismissed from the Department. Based on the seriousness of Respondent's misconduct, and the high public trust police officers must fulfill, I agree with that recommendation. In *Disciplinary Case No. [REDACTED]*

[REDACTED] a 21-year police officer with no disciplinary record was dismissed from the Department for touching the vaginal area of [REDACTED]

Under the totality of circumstances in this case, the same penalty is warranted here.

Respondent has been found guilty of wrongfully touching the vagina, butt, and breasts of Person A. [REDACTED] The

Department strives to maintain a high standard of integrity, and members of service are expected to respect the dignity of each individual. With his conduct toward Person A, Respondent severely violated that trust, and separation from the Department is warranted. Accordingly, I recommend that Respondent be DISMISSED from the New York City Police Department.

Respectfully submitted,



Jeff S. Adler  
Assistant Deputy Commissioner Trials

**APPROVED**



FEB 06 2019  
JAMES P. O'NEILL  
POLICE COMMISSIONER



POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials  
To: Police Commissioner  
Subject: CONFIDENTIAL MEMORANDUM  
SERGEANT HECTOR MERCADO  
TAX REGISTRY NO. 919410  
DISCIPLINARY CASE NO. 2017-17542

Respondent was appointed to the Department on April 15, 1997. On his last three annual performance evaluations, Respondent received the following ratings: for 2014, he received an overall rating of 4.5 "Extremely Competent/Highly Competent," and for both 2015 and 2016, he received an overall rating of 4.0 "Highly Competent." He has been awarded two medals for Excellent Police Duty and one medal for Meritorious Police Duty.

[REDACTED]

On June 14, 2017, Respondent was suspended from duty as the result of the misconduct charged in the above case. He remains on suspended duty status.

Respondent has no disciplinary record.

For your consideration.

Jeff S. Adler  
Assistant Deputy Commissioner Trials